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No. 203.

Supreme Court of the United States

THE SOUTH COVINGTON AND CINCINNATI STREET RAILWAY COMPANY AND THE SUBURBAN ELECTRIC COMPANY,
Appellants,

vs.

THE CITY OF NEWPORT, KENTUCKY,
Appellee.

Brief for Appellee.

BRENT SPENCE,
Attorney for Appellee.

THE COURT INDEX PRESS, 646-650 Main st., Cincinnati, Ohio, March, 1922.

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(October Term 1921)

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THE SOUTH COVINGTON AND CINCINNATI STREET RAILWAY COMPANY AND THE SUBURBAN ELECTRIC COMPANY,
Appellants,

vs.

THE CITY OF NEWPORT, KENTUCKY,
Appellee.

Brief for Appellee.

STATEMENT OF CASE.

This action was instituted by appellants against the appellee to declare null and void, and to enjoin the enforcement by appellee of a resolution adopted by the Board of Commissioners of the City of Newport, Kentucky, on November 20th, 1917, which is as follows:

> "Whereas the South Covington and Cincinnati Street Railway Company maintain a high-tension wire extending from the the Central Bridge at Front Street in the City of Newport, Kentucky, to the power

house of said Company at Eleventh and Brighton Street in Newport, and

"Whereas the said wire contains an electrical current of very high voltage and is dangerous to life and property, and

"Whereas the removal of said wire is necessary to secure the safety of the lives and property of the citizens be it,

"Resolved, by the Board of Commissioners of the City of Newport, Kentucky, that the South Covington and Cincinnati Street Railway Company be directed to remove said wire not later than December 1, 1917, and that a copy of this resolution be sent to the South Covington and Cincinnati Street Railway Company.

"Adopted by the Board of Commissioners November 20, 1917."

The high tension wire, the subject of the resolution, and of this suit extends from the entrance of the Central Bridge in the City of Newport to the power-house of appellant companies through the entire length of the City. The wire which conveys a current of 12,000 volts of electricity is carried upon wooden poles by means of insulators fastened to wooden horizontals or cross arms, and is used for the purpose of conveying, from the power house of The Union Gas and Electric Company in Cincinnati, electricity to the power house of appellant companies in Newport, for the purpose of furnishing light, heat and power to the city of Newport and its citizens and inhabitants, and also for the purpose of furnishing electricity for the propelling of cars of appellant the South Covington and Cincinnati Street Railway Company in the City of Newport.

Appellants aver that they have acquired the authority and right to erect these poles and string the high-tension wire by reason of the fact that they are the owners of certain grants and franchises from the State of Kentucky and the City of Newport, which they set up in their petition.

Appellee filed its answer on February 8th, 1918. On December 6th, 1918, it filed an amended answer in which it alleged:

> "That the enforcement of said resolution complained of in the bill herein and the removal of the said poles and high tension wire described in the bill will not be attempted to be made by defendant or any officer, or agent, or servant of said defendant, but will only be sought through an order of the Campbell Circuit Court, a Court of competent jurisdiction, first had and obtained and after hearing and of due and reasonable notice to all interested parties."

Upon final hearing the Court dismissed the cause for want of jurisdiction and the cause is here, upon direct appeal, from the District Court.

ARGUMENT.

The opinion of the District Court is so very brief that we copy it herein, in full. It is as follows:

> "This cause is before me on final hearing. I do not think that I have jurisdiction of the cause. No diversity of citizenship exists between the parties. The sole ground of jurisdiction is that it involves a federal

question. There can be no doubt that the resolution complained of is a state law within the meaning of Section 10 of Article I of the federal constitution. But it does not impair the obligation of such contract as plaintiff has with defendant. It simply directs the plaintiff, Street Railway Company, to remove the high-tension wire complained of. It is based upon a denial of its right to maintain it. But the resolution does not contemplate any action on behalf of the city towards removing it outside of the institution of legal proceedings having that end in view. It is inconceivable that an attempt to remove it would be made in any other way. The case comes within the decision in the case of *Des Moines* v. *Des Moines City Ry. Co.*, 214 U. S., 179.

"The cause is, therefore, dismissed for want of jurisdiction."

It is obvious from a mere cursory reading of the resolution complained of that it does not direct any officer of the city to remove the wire nor does it provide any manner for its removal. It is merely a request to the South Covington and Cincinnati Street Railway Company, one of the appellants, to remove the wire not later than December 1st, 1917. And no request is made to, and the resolution does not apply to the appellant The Suburban Electric Company.

There is nothing in the record showing that appellee will remove or attempt to remove the wire, or take any action in this respect other than the mere adoption of the resolution. Appellants must rest the question of jurisdiction upon its adoption. The city has done nothing more than merely adopt the

resolution; no penalties are prescribed for failure to comply therewith, and it required no affirmative action by any officer or agent of the city.

It is inconceivable that this resolution could operate to impair any of appellants alleged contracts or take their property without due process of law.

So far as the present resolution is concerned, the enforcement of it is left entirely to the South Covington and Cincinnati Street Railway Company, and if it refuses to do as the city directs, the purpose of this particular resolution will have ended. It is directed to but one corporation, and commands it to do a definite thing. Its purpose was frustrated and its powers exhausted when that company refused. Any further action that may be taken in the future by the city would certainly be entirely independent of the adoption of this resolution and could not be considered in connection with it.

The appellants do not allege under what authority the City of Newport has adopted the resolution, and for the resolution to be a State Law within the meaning of the Constitution, it has been held that it must be a valid resolution, adopted by the municipality under a proper grant of power. It may be seriously doubted whether a resolution could have the effect, of repealing an ordinance or of nullifying any rights granted under an ordinance. The purpose of a resolution could be effectuated by motion, the subject matter of which would not properly constitute an ordinance. We do not urge this contention for the judgment of the lower Court which we think was sound, was not based upon it.

There is a much stronger reason why the judgment of the lower Court should be sustained.

In this case there is no diversity of citizenship. All the parties are corporations under the laws of the State of Kentucky, and the only manner in which the Court could have obtained jurisdiction is by the violation by appellee of some constitutional right of appellants.

It has been the constant policy of the Federal Courts to prevent this discrimination from being evaded.

In *Bernards Township* v. *Stebbins*, 109 U. S., 341-350, the Court said:

> "But in the matter of the jurisdiction of the Federal Courts, the discrimination between suits between citizens of the same State and suits between citizens of different States is established by the Constitution of the United States. And it has been the constant effort of Congress and of this court to prevent this discrimination from being evaded by bringing into the Federal Courts controversies between citizens of the same State."

That the resolution itself did not invade any of the Constitutional rights of appellants seems clear, not only from the very obvious reason that it was entirely ineffectual to do anything, and was merely a request without penalties prescribed upon failure to comply, but the question here involved has been settled beyond any ground of controversy by many adjudicated cases.

In the case of *American Telephone & Telegraph Company, of Alabama* v. *Town of New Decatur*, 176 Federal, 133, the facts are similar to the facts in the case at bar. This was a suit in equity the purpose

of which was to enjoin the Town of New Decatur from interfering with plaintiff's telephone system, consisting of lines of poles and wires as constructed in that town, and from instituting legal proceedings in the State Courts to enjoin the plaintiff from operating and maintaining and managing its telephone system in the town of New Decatur. The bill avers certain grants to plaintiff of franchises to occupy with poles and wires the highways of the town, subject to certain supervision and regulations. It also avers the adoption of an ordinance by the town providing, (1) for the removal from the highways of plaintiff's poles and wires by plaintiff, (2) in the event of plaintiff's failure to effect such removal in thirty days for the removal thereof by the town officers; and (3) declaring the maintainance of said poles and wires thereafter by plaintiff a nuisance for which plaintiff's employees and officers were made responsible. All of which it was alleged was in violation of Article 1, of Section 10 of the Constitution and of the due process clause of the Fourteenth Amendment thereto.

The opinion of the Court in the above case so thoroughly collates all the authorities and so ably discusses the question involved herein that we shall quote from it at length.

The Court says at page 137:

> "There is a stronger reason why the conduct of the defendant, as set out in the bill, does not constitute legislation impairing the obligation of contract rights. The rule is well settled that an ordinance or resolution of municipality, the effect of which is merely to deny liability upon or repudi-

ate a contract, and which creates no antagonistic rights or duties, is not impairing legislation, though the contract repudiated is valid and binding. In the case of *St. Paul, Gas Light Co. v. St. Paul*, 181 U. S., 142, 149, the court expressed the principle in this language:

" 'The other provision (of the ordinance) in question created no right or imposed no new duty substantially antagonistic to the obligations of the contract, but simply expressed the purpose of the city not in future to pay the interest on the cost of the construction of the lamp posts, which were ordered to be removed; that is to say, it was but a denial by the city of its obligation to pay, and notice of its purpose to challenge in the future the existence of the duty to make such payment. This denial, whilst embodied in an ordinance, was no more efficacious than if it had been expressed in any other form, such as by way of answer filed on behalf of the city in a suit brought by the company to enforce what it conceived to be its rights under the contract. When the substantial scope of this provsion of the ordinance is clearly understood, it is seen that the contention here advanced of impairment of the obligations of the contract arising from this provision of the ordinance, reduces itself at once to the proposition that wherever it is asserted on the one hand that a municipality is bound by a contract to perform a particular act and the municipality denies that it is liable under the contract to do so, thereby an impairment of the obligations of the contract arises in violation of the Constitution of the United States. But this amounts

only to the contention that every case involving a controversy covering a municipal contract is one of federal cognizance determinable ultimately in this court. Thus to reduce the proposition to its ultimate conception is to demonstrate its error."

In the case of *Mercantile Trust Co.* v. *Columbus*, 203 U. S., 311, 321, the court said:

"The ordinance and act were not mere statements of an intention on the part of one of the parties to a contract not to be bound by its obligations. Such a denial on the part, even of a municipal corporation, contained in an ordinance to that effect, is not legislation impairing the obligation of a contract. *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S., 142.

"And after quoting from the case there cited, the portion incorporated in this opinion, the court said further:

" 'In the case at bar the conditions are entirely different. There was not merely a denial by the city of its obligation under the contract, but the question is whether there were not new and substantial duties in positive opposition to those contained in the contract created, and their performance provided for by the ordinance and act. The act of the legislature aided the city by granting it power to itself to erect waterworks and to issue bonds in payment thereof and the city was proceeding to avail itself of the power thus granted, when its progress was arrested by the filing of the bill in this case, and the issuing of a temporary injunction. It would seem as if the case were really within the principle decided in *Walla Walla* v. *Walla Walla Water*

Co., 172 U. S., 1; *Vicksburg Water Co.* v. *Vicksburg*, 185 U. S., 65; again reported *Vicksburg* v. *Water Co.*, 202 U. S., 453; *Davis* v. *Los Angeles*, 189 U. S., 207; *Knoxville Water Co.* v. *Knoxville*, 200 U. S., 22.

"The case of *Dawson* v. *Columbia Trust Co.*, 197 U. S., 178, 181, clearly differentiates the class of cases in which the ordinance merely denies liability and repudiates the contract obligation, from the other class in which the ordinance creates rights or duties antagonistic to the contract rights charged to have been impaired. In that case the court said:

" 'The mere fact that the city was a municipal corporation does not give to its refusal the character of a law impairing the obligation of the contract or deprive a citizen of property without due process of law. That point was decided in *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S., 142-150. Undoubtedly the decisions on the two sides of the lines are very near to each other.

But the case at bar is governed by the one which we have cited and not by *Walla Walla Walla Walla Water Co.*, 172 U. S., 1, which is cited and distinguished in *St. Paul Gas Light Co.* v. *St. Paul.* In *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U. S., 60, the city had made a contract with the waterworks company, and afterwards a law was passed authorizing the city to build new works. The city acting under this law denied liability and took steps to build the works whereupon the waterworks company filed its bill, alleging the law to be unconstitutional. This bill was held to present a case under the Constitution. In the case before us, there was no legislation sub-

sequent to the contract, and it is not even shown that there was a color of previous legislation for the city's acts. These acts are alleged to be unlawful and the allegation would be maintained by showing that they were not warranted by the laws of the State. See *Hamilton Gas Co.* v. *Hamilton City*, 146 U. S., 258-266; *Lehigh Water Co.* v. *Easton*, 121 U. S., 388-392. We repeat that something more than a mere refusal of a municipal corporation to perform its contract is necessary to make a law impairing the obligation of contract or otherwise give rise to a suit under the Constitution of the United States.

"On one side of the line of cases are *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S., 1, *Vicksburg* v. *Vicksburg Waterworks Co.*, 185 U. S., 60, *Cleveland* v. *Cleveland City Ry. Co.*, 194 U. S., 517, *Mercantile Trust Co.* v. *Columbus*, 203 U. S., 311, and *Northern Pacific R. R. Co.* v. *Duluth*, 208 U. S., 583. In each of these cases the municipal legislation amounted to more than a naked breach or repudiation of contract, in that it created powers and rights in antagonism to the contract rights, such as the power to construct competing water or gas works, when an exclusive right was given by the contract or ordinance, or an authority to issue bonds or call an election to that end, or the authority to compel a railroad company to construct or maintain at its expense a viaduct over a highway. On the other side of the line are the cases of *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S., 142, *Dawson* v. *Columbia Trust Co.*, 187 U. S., 178, and *Des Moines* v. *City Ry. Co.*, 214 U. S., 179, in each of

which the ordinances were construed to amount to no more than a breach or repudiation of a municipal contract, and, for that reason, not to constitute legislation impairing the obligation of contract within the meaning of the Constitution. Upon the proper classification of the case at bar in this respect depends its correct decision. In the case at bar no antagonistic rights or powers to those of the original contract or ordinance were created by the subsequent ordinances and resolutions, and the case resembles in that respect the line of cases last cited. There was (1) a mere repealing ordinance; (2) an ordinance directing the plaintiff to remove its poles and wires from the streets within 30 days, and in the event of its failure to do so a direction to the town authorities to remove them and a declaration that their continued maintenance thereafter would constitute a nuisance; and (3) subsequent resolutions directing the city attorney to file proceedings in the state court to compel the removal of the plaintiff's poles and wires from the streets, to compel it to cease doing business after the expiration of its existing license, and forbidding its reissue to plaintiff. So far as the ordinances and resolutions concern the right of plaintiff to do business, other than its right to maintain poles and wires on the highways, no federal question is involved, for there is no showing in the bill of any vested right to a license to do business in any other sense in the town limits. Eliminating the license feature, the case at bar is identical in legal effect with that of *Des Moines* v. *City Ry. Co.*, 214 U. S., 179, and is controlled by it. The opin-

ion of the court is brief, and is set out in full as follows:

" 'This is a bill brought in the Circuit Court by an Iowa corporation against a city of Iowa. The ground of jurisdiction is that a resolution of the city council of that city is a law impairing the obligation of contracts within the meaning of the Constitution of the United States, and if carried out will take the property of the corporation without due process of law, contrary to the fourteenth amendment. The Circuit Court granted an injunction against the enforcement of the resolution, and the defendant appealed to this court. The plaintiff, the appellee, sets up, under a certain ordinance, a right unlimited as to time to construct, maintain and operate an electric street railway in and over the streets, alleys and bridges of Des Moines.

" 'The resolution alleged to impair these rights is as follows: "Whereas questions have been raised as to the rights of the Des Moines City Railway Company and the Interurban Railway Company to maintain their tracks and operate their lines upon and along and over the streets and bridges and public places of the City of Des Moines ; and whereas, it is essential to the preservation of the rights of the City of Des Moines that such questions be determined as speedily as possible: Be it resolved by the city council of the City of Des Moines that said companies be and they are hereby ordered to remove all of their tracks poles and wires from the streets, bridges and public places of the city of Des Moines, and to restore and repair the surface and pavement where paved of all of the streets

along which they are now operating their lines, and said companies are hereby ordered to commence said removal within twenty-five days after the passage of this resolution; be it further resolved, that should the said railway companies fail to commence such removal within the time above specified, the city solicitor be and he is hereby instructed to take such action as he shall deem advisable and necessary to secure the enforcement of the above resolution; be it further resolved, that the city clerk be and he is hereby instructed to serve a certified copy of this resolution upon the Des Moines City Railway Company and the Interurban Railway Company forthwith.' "

" 'We are of opinion that this is not a law impairing the rights alleged by the appellee, and therefore that the jurisdiction of the Circuit Court cannot be maintained. Leaving on one side all questions as to what can be done by resolution as distinguished from ordinance under Iowa laws, we read this resolution as simply a denial of the appellee's claim and a direction to the city solicitor to resort to the courts if the appellee shall not accept the city's views. The resolution begins with a recital that questions as to the railway company's rights have been raised, and ends with a direction to the city solicitor to take action to enforce the city's position. The only action to be expected from a city solicitor is a suit in court. We cannot take it to have been within the meaning of the direction to him that he should take a posse and begin to pull up the tracks. The order addressed to the companies to remove their tracks was sim-

ply to put them in a position of disobedience, as a ground for a suit, if the city was right.' "

"In the case at bar, it is true that the ordinance of May 3, 1904, directs the town marshal to remove the poles, if the plaintiff failed to do so in the stipulated time. This might differeniate the case from the case cited, except for the fact that on May 11th thereafter the city council adopted a later resolution, directing the city attorneys to institute and prosecute in the name of the defendant such a suit or proceeding as might be deemed proper by them to compel the plaintiff to remove its poles and wires from the streets and to prevent their use in its telephone business. This resolution, passed subsequently, clearly indicates the abondonment by the defendant of any intention on its part to remove the poles and wires by violence, and an intention to compel their removal by legal proceedings only. The passage of a resolution authorizing the institution of a suit to compel removal is inconsistent with a purpose to proceed under an earlier resolution to remove by force and without suit. The bill also avers "that, in pursuance of the ordinances and resolutions passed by the board of aldermen of the city of New Decatur, as hereinabove set forth, the said city authorties of the said city intend forthwith and without delay to take steps to force orator to remove its poles and wires from the public streets of said city." The averment is that the removal was to be forced pursuant to the ordinances and resolutions set out in the bill: that is, by filing legal proceedings to compel their removal. No

> acts or threats of defendant are averred or relied on other than the ordinances and resolution set out in the bill, as indicating a purpose on its part to resort to violence. Construing the resolutions and ordinances as an entirety, the only action reasonably to be expected to be taken by the town authorities was a suit in court. This case is, therefore, identical with the case of *Des Moines City Railway Co., supra*: and controlled by it. For the reasons stated, the court is without jurisdiction.'"

In *Southern Bell Telephone & Telegraph Co.* v. *City of Birmingham, Ala.*, et al 211 Fed. 709, which followed the reasoning of and in which is cited the same authorities as cited in the case of *American Tel. & Tel. Co.* v. *Town of New Decatur* (*supra*), a bill was filed by plaintiff to restrain the enforcement of an ordinance of the City of Birmingham and to have it declared null and void and a cloud on plaintiff's title to its franchise to collect tolls from its subscribers. The Ordinance assailed in effect repealed a previous ordinance which purported to make effective an agreement between the telephone company and the City for service to be charged to the inhabitants of the city for five years in the future. Under it the Company was to have the right to increase its rates for certain character of service from January 1, 1914.

The repealing ordinance cited the making of the agreement, the passage of the ordinance, that the contract was *ultra vires* of the powers of the city commission, that it had been breached by the company's alleged failure to give the character of ser-

vice stipulated to be given by it to its subscribers; and declared the contract and ordinance rescinded and annulled as being both *ultra vires* and as having been breached by the telephone company. The contention of the telephone company is that the repealing ordinance impairs the obligation of the original contract and the ordinance ratifying it, and is for this reason obnoxious both to the State and Federal Constitution.

The court held in this case, as it held also in the case of *American Tel. & Tel. Co.* v. *Town of New Decatur* (*supra*), that in order to sustain the contention that the subsequent ordinance is invalid for the reason asserted by the telephone company it must establish (1) the existence of the contract; (2) the obligation imposed on the city and its inhabitants by it; (3) the impairment of such obligation by State legislation. It held that the ordinance complained of was not legislation impairing any of the constitutional rights of the telephone company.

The Court in distinguishing this case from the line and character of cases cited by appellant herein in their brief said, page 712:

> "The plaintiff relies upon the cases of *Iron Mountain R. R. Co.* v. *Memphis*, 98 Fed., 113, 37 C. C. A. 410, *Detroit* v. *Detroit Citizens Ry. Co.*, 184 U. S., 368, and *Cleveland* v. *Cleveland City Ry. Co.*, 194 U. S., 517. In each of these cases there was something more in the ordinance than a mere declaration of repudiation of the contract. The ordinance, in each case, had an affirmative provision, susceptible of enforcement, in addition to the declaration of invalidity.
>
> "In the case of *Iron Mountain R. R. Co.*

v. *Memphis*, the ordinance declared the forfeiture of a franchise to occupy a street with railroad tracks, and, as the court held, authorized a re-entry by the city upon the premises in possession of the railroad. Its effect, if enforced, was to dispossess the railroad of property in its possession, and it was to prevent this enforcement and the consequent dispossession of the railroad, that it was held entitled to relief. In the case at bar the ordinance authorizes no interference or disturbance of the plaintiff or its property or franchise, but merely attempts to declare invalid a contract.

"In the case of *Detroit* v. *Detroit Citizens Ry. Co.*, 184 U. S., 368, at page 380, the city by an ordinance had reduced the fare of the street railroad company, and had prescribed a specific maximum fare as the lawful fare. Having fixed a specific fare as the only lawful fare, the railroad company was forced to accept the reduced fare, or eject the passenger, and likely create in so doing a breach of the peace. The answer of the city admitted that 'they intend to enforce obedience by the company to such ordinances.' Even then, the court stressed the fact that the answer of defendants did not question the jurisdiction of a court of equity, as partly justifying its retention of jurisdiction over the cause.

"In the case of *Cleveland* v. *Cleveland City Ry. Co.*, 194 U. S., 517, at page 531, there was also a specific maximum fare of four cents fixed by the ordinance as the only lawful fare, as was true in the Detroit case. The court relies upon the peculiar fact, present in the case, that the enforcement of the ordinance would have estab-

lished two rates of fare on the same line: 'leading to consequences dangerous to the public interest, peace and tranquility, the extent of which it would be difficult in advance to perceive.' And this, we think, brings the case directly within the principle by which jurisdiction in equity was maintained in *Detroit* v. *Detroit Citizens' Ry. Co.*, 184 U. S., 368.

"It is clear that jurisdiction was only sustained because by reason of the peculiar relations of a passenger carrier to its patrons and the fact that the ordinance fixed a specific rate of fare, the ordinances would either necessarily have to be observed by the carrier, or breaches of the peace continually provoked in the resistance of them, to the detriment of the parties and the public. In each of those cases, as in this case, the ordinance provided no penalty for its breach, but there were other means of enforcement, from the nature of the carrier's business, that do not exist in this case."

And also, on page 714:

"Again, in this case the danger of breaches of the peace, as a result of the plaintiff's resistance to the ordinance, is removed because of the differing character of plaintiff's business from that of a carier of passengers. If the plaintiff's patrons refuse to pay the rate fixed by it, it has but to discontinue their service. Its rates are collected in advance. By refusing to furnish service, it subjects itself only to the liability to be sued that any person does who breaches a contract, in good faith, but under a mis-

taken view of his rights. Equity does not relieve against such a situation. Discontinuance of service does not imply the necessity of ejection by force, as does the refusal to accept a reduced fare from a passenger who is already on the carrier's vehicle. The reasons which induced the Supreme Court to distinguish the cases, relied upon by plaintiff, from the general legal principle stated are absent from this case. It presents only a case of a declared repudiation of a contract by an ordinance, one which, it is well settled, does not constitute impairing action by the state."

And further along, on the same page, the court said:

"The harm, if any, to be caused by it, was completely accomplished upon its enactment. Its enactment could not have been properly enjoined in advance, since, being legislative action, it was not subject to the control of the courts. Its enforcement by the city can not be enjoined, since by its terms it is not to be so enforced and no steps are prescribed to be taken by any one in the way of its enforcement."

And on page 715, the Court said:

"An inspection of the ordinance of December 12, 1913, shows that no action of the city or its officers could be taken 'pursuant to or under the authority' of it, since it prescribed none to be taken. It is declarative only of a forfeiture of the contract, without providing at all as to how the forfeiture is to be enforced. The only action taken, or to be taken with relation to the

ordinance, upon the part of the city, was its enactment. That could not have been enjoined in the first instance. Its repeal can not now be ordered by the court. As the ordinance contains no provisions looking to its enforcement by the city or its officers, it is clear that there is no room for injunctive relief with relation to the ordinance against the city or its agents or the commissioners, as such."

Appellants complain in their brief that the jurisdictional question was not raised in the original answer of appellant, and that the question of jurisdiction was set up by "amended answer filed ten months later puporting to state the present purpose of the city."

Section 37 of the judicial code provides that "if in any suit commenced in a district court * * * it shall appear to the satisfaction of said district court, at any time, such suit has been brought * * * that such suit does not really and substantially involve a suit or controversy properly within the jurisdiction of said district court * * * * * * the said district court shall proceed no further therein, but shall dismiss the suit * * * and shall make such order as to costs as shall be just."

The objection that jurisdiction to entertain the suit did not exist is one that may be taken by answer. *Anderson* v. *Watt*, 138 U. S., 694.

Indeed, it has been frequently decided, under Section 37 it is the duty of the court when it shall appear to its satisfaction that the suit does not really and substantially involve a suit or controvesy properly within its jurisdiction, to dismiss the same,

and this the court may do whether the parties raise the question or not.

In *Defiance Water Co.* v. *Defiance*, 191 U. S., 184, the court said:

> "The fundamental question of jurisdiction first, of this court and then of the court from which the record comes, presents itself on every writ of error or appeal and must be answered by the court whether propounded by counsel or not. *Mansfield Coldwater & C. Railway Co.*, v. *Swan*, 111 U. S., 379-382; *Metcalf* v. *Watertown*, 128 U. S., 586; *Morris* v. *Gilmer*, 129 U. S. 315; *Continental National Bank* v. *Byford*, 191 U. S., 119."

It is true appellants alleged that unless restrained by the court appellee will forcibly remove and destroy the wire, but appellants can not strengthen their case by imputing motives or purposes to appellee that can not reasonably be read into the resolution.

It is obvious the District Court would have dismissed this cause for lack of jurisdiction, if the amended answer had not been filed for its judgment was not based upon the amended answer, but upon the resolution complained of.

The District Court in effect said the resolution needed no interpretation, as the intention expressed by it was clear.

The pertinent part of the opinion is as follows:

> "But the resolution does not contemplate any action by the city towards removing it (the high tension wire) outside of

the institution of legal proceedings having that end in view.

"It is inconceivable that an attempt to remove it would be made in any other way."

Appellant's cause of action is measured by the resolution. Upon it is based the question of jurisdiction. And upon it they must prevail or fail.

We respectfully submit that the judgment of the Court below should be affirmed.

BRENT SPENCE,
Attorney for Appellee.